ject to this Act to sue and be sued in its corporate name and to acquire and dispose of property both movable and immovable and to do and to perform such other acts as bodies corporate may by law perform."

The respondent says that such construction is merely consistent with the power given to the Bar Council under section 57(j) of the Act which reads —

"57(j) to institute, conduct, defend, compound or abandon any legal proceedings by and against the Malaysian Bar or its officers or otherwise concerning the affairs of the Malaysian Bar and to compound and allow time for payment or satisfaction of any debts due or of any claims or demands made by or against the Malaysian Bar."

The applicant's counsel on the other hand, refers me to section 73(ii) which reads as follows —

"73(ii) to promote and safeguard the interests of advocates and solicitors who are members of the State Bar;"

Counsel says it is the duty of the Committee to safeguard the interests of its members by filing an action against a recalcitrant member.

But two things must first of all be put straight. First that it cannot be but common ground that whatever power the Committee has to act on its own behalf as far as legal proceedings are concerned must be found in the Act itself and secondly the intention of the Act can only be gathered from the language of the Act and by reading it as a whole. One cannot help feeling that from the force of counsel's argument he is urging that the Bar Council and the Bar Committee are separate entities having separate rights and duties and having a life of their own. If that is so it is therefore natural to assume that the legislature in making provision on a matter in one, would also make provision for the same matter in the other. In so far as the Bar Council is concerned there can be no doubt that it has the capacity to sue and be sued because section 41 expressly so provides. It has also the power to do so because section 57(j) gives it that power. We can therefore say that in so far as the Bar Committee is concerned that if the legislature had intended to give a similar power and capacity that it would have similarly so legislated, but clearly looking at section 73 no such provisions *mutatis mutandis* had ever been made. Consequently if it is pointed out that under sub-section (ii) the Committee is given the power to promote and safeguard the interests of its members it cannot be but construed to mean that it can do so provided, whatever action is taken, falls short of proceedings in court. It seems to be the clear implication therefore that in so far as taking legal proceedings in court is concerned the Bar Council is solely authorised to do so. Indeed that must be the necessary implication if section 57(e) is to have effect which reads —

"57(e) to represent members of the Malaysian Bar or any section thereof or any particular member in any matter which may be necessary or expedient;"

It seems to be the clear implication therefore that the Bar Committee must necessarily act through the Bar Council in matters of legal proceedings in court.

I would have no hesitation therefore in saying the maxim *expressio unius est exclusio alterius* must apply here. But one thing must be said however. That what has been said so far goes only to support the view that the right to sue or be sued in so far as the conduct of the members of the Malaysian Bar and all matters pertaining to it are concerned is that of the Bar Council only and not the Bar Committee, which must necessarily mean on general principle that it does not prevent the Council, if it chooses, to permit the Bar Committee to use its name by related action. That would I imagine be an equitable construction if only to save the cost of the Bar Council. All I need to say now therefore is that the action of the Bar Committee clearly is not related to the Bar Council and therefore for present purposes has no *locus standi*. It is open therefore now to the Bar Council to resolve whether it wishes to take up the issue in this court in place of the Bar Committee or for the Bar Committee to do what is necessary to restore itself. For the moment I will dismiss this application with liberty to the parties to apply.

Order accordingly.

Solicitors: *S. Sivasubramanian; Au Ah Wah & Co.*

KULIM RUBBER PLANTATIONS LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Vohrah J.) April 14, 1979]
[Kuala Lumpur — Tax Appeal No. 1 of 1976]

Revenue Law — Sale of buildings on which capital allowances given — Value of buildings for purpose of income tax — When proceeds of sale deemed to be income — Compensation payments made to estate agents and secretaries — Whether allowable deductions — Outgoings and expenses incurred in production of income — Income Tax Act, 1967, ss. 14 & 18A.

Precedent — English authorities on income tax — Whether relevant.

The appellant in this case owned extensive rubber plantations in Malaysia. In 1961 it decided on a new policy by embarking on a large scale programme of oil-palm planting. To implement this policy and to raise funds it decided on selling the more outlying and less profitable rubber estates. In 1964 the appellant sold various pieces of land in Kahang, Kluang, Johore, in which were a number of buildings on which the appellant claimed capital allowances. In 1965 the appellant sold several pieces of land in Terap, Kulim, Kedah on which it also claimed capital allowances. The appellant had also employed agents and secretaries in the conduct of its business and had agreed that in the event of the sale of the whole or part of the appellant's estate, they would be entitled to compensation.

In respect of the Kahang estate the total capital allowances granted by Revenue amounted to $16,937 and the proceeds of sale totalled $36,146. The capital expenditure incurred on the building was $37,052. In respect of the estate in Terap, the capital allowances granted by Revenue amounted to $58,824. The proceeds of sale totalled $55,951.50. The capital expenditure incurred on the buildings totalled $91,649. The appellant paid $405,334 to its London and Eastern Agents and claimed deduction.

The Special Commissioners held that the taxable income of the appellant (a) for the buildings on the Kahang estate was $19,209, the proceeds of sale and (b) for the buildings on the estate at Terap was $55,951.50, the proceeds of sale. They also held that the payments to the agents were not deductible as they were not incurred wholly and exclusively in the production of income.

The questions that arose in this case were (1) the value of the buildings on the estates at the time of sale; (2) whether

the compensation payments to the estate agents and secretaries were allowable deductions.

Held: (1) the Special Commissioners were wrong in addressing their minds only to the provisions of proviso (i) to section 18A(3)(c) and in failing to take into account the provisions of proviso (ii) under which the method of computation to be applied by the Special Commissioners and the result thereof would have been different;

(2) in regard to the Kahang estate as the capital allowances granted together with the proceeds of sale did not exceed the capital expenditure, there was no taxable income in respect of the buildings;

(3) in regard to the estate in Terap, Kedah, the total of the capital allowances granted together with the proceeds of sale exceeded the capital expenditure by $23,126 and this was therefore the taxable income on the buildings;

(4) the payments by way of compensation resulting as a matter of legal obligation from the sales must be regarded as a matter of commercial expediency and attributable to the whole venture which was carried out for the production of income. They were made in order indirectly to facilitate the carrying on of the business and were accordingly incurred wholly and exclusively in the production of income;

(5) if the Special Commissioners had been properly instructed on the law they would have reached the conclusion that the expenditure by the appellant by way of compensation for loss of earnings or commission to the estate agents was deductible under the provisions of section 14(1) of the Income Tax Act.

Cases referred to:-

(1) *Strong and Company of Romsey Limited* v. *Woodfield*, 5 T.C. 215, 220.
(2) *Rowntree & Company Ltd.* v. *Curtis* 8 T.C. 678, 696.
(3) *Smith's Potato Estates Ltd.* v. *Bolland* 30 T.C. 267, 292.
(4) *W. Nevill and Company Limited* v. *Federal Commissioner of Taxation* 56 C.L.R. 290.
(5) *Ward and Company Limited* v. *Commissioner of Taxes* [1923] A.C. 145.
(6) *Anglo-Persian Oil Company Ltd.* v. *Dale* 16 T.C. 253.
(7) *Vallambrosa Rubber Co. Ltd.* v. *Farmer* 5 T.C. 529.
(8) *J.P. Hancock* v. *General Reversionary and Investment Co. Ltd.* 7 T.C. 358.

TAX APPEAL.

Peter Mooney for the appellant.

Mokhtar bin Sidin for the respondent.

Cur. Adv. Vult.

Vohrah J.: This is an appeal by way of case stated against the deciding order of the Special Commissioners of Income Tax made on January 28, 1976—

(1) confirming the additional estimated assessment of income tax in respect of the appellant for the year of assessment 1964 in the sum of $102,856.60;
(2) amending the additional assessment of income tax in respect of the appellant for the year of assessment 1966 in the sum of $68,907.20 by reducing the valuation of building from $58,824.00 to $55,951.00;
(3) confirming the assessment of income tax in respect of the appellant for the year of assessment 1967 in the sum of $96,812.70.

The orders in respect of the years of assessment 1964 and 1966 involve the question as to the value of certain buildings at the time of the sale of the estates whereon the buildings stood. The order in respect of 1967 revolves round the question as to whether certain compensation payments to estate agents and secretaries were allowable deductions under section 14 of the Income Tax Ordinance, 1947 (hereinafter referred to as "the Ordinance") as being outgoings and expenses wholly and exclusively incurred in the production of income.

The undisputed facts as far as this appeal is concerned are as follows. The appellant which is a limited company owned extensive rubber plantations throughout Malaysia. In 1961 it decided on a new policy by embarking on a large-scale programme of oil-palm planting in order to increase its income because it considered that long-term prospects for natural rubber were not encouraging and also found that a number of its plantations contained old rubber trees which yielded only marginal profits. To implement this policy it had to have substantial funds to invest, among other things, in heavy capital costs for the installation of oil-palm mills and to raise these funds it decided on selling the more outlying and less profitable rubber estates. It sold these estates and used the proceeds of the sales to convert the greater part of the remaining more closely-grouped properties to oil-palm cultivation. The nett proceeds of these sales were actually wholly expended in oil palm development and the result was to convert its undertaking into a smaller acreage. The conversion of two-thirds of the remaining area from rubber planting to oil-palm planting enhanced the appellant's earning capacity both in total gross income and in taxable profit. The individual estates which made up the appellant's undertaking were never treated even by Revenue as separate businesses but as one single business undertaking.

On May 4, 1963 the appellant sold various pieces of land in the Mukim of Kahang in the District of Kluang. These lands were collectively known as "the Kahang Estate." On this estate were a number of buildings for which the appellant claimed allowances for capital expenditure on plantations under section 18A of the Ordinance and was granted the sum of $16,937 as such allowances. The actual cost of constructing the buildings was $37,052 whilst their tax written down value and the proceeds of sale therefrom were respectively $20,115 and $19,209.

Later on June 23, 1965 the appellant again sold several pieces of land in the Mukims of Terap and Serdang in the District of Kulim, Kedah collectively known as "the Ghim Khoon Estate" whereon too there were a number of buildings and structures by way of extensions to existing buildings in respect of which the appellant had claimed allowances for capital expenditure on plantations under section 18A and was granted the sum of $58,824 as such allowances. The actual cost of constructing the buildings and structures was $91,649 and the tax written down values amounted to $32,825 but no figures were available as to the actual proceeds of sale. The Special Commissioners on the basis of the evidence before them estimated the value of the buildings and the extensions at $55,951.50 which figure was accepted by both counsel for the appellant and counsel for Revenue as the proceeds of sale of the building at the hearing of the appeal before me.

So much for the undisputed facts of the case relating to the valuation of the buildings and structures on the two estates.

Counsel for the appellant contended before me that the Special Commissioners either applied the wrong law or applied the law wrongly in coming to their decision with regard to the buildings and structures none of which had been up for more than ten years at the time of the sale. Counsel for Revenue did not dispute the fact that these buildings and structures were less than ten years old.

As the assessments were made on the buildings separately — those on the Kahang Estate in 1964 and those on the Ghim Khoon Estate in 1966 — I shall deal for the sake of convenience with the Kahang Estate first.

The Comptroller-General of Inland Revenue had granted the appellant capital allowances in respect of the buildings in the Kahang Estate in the sum of $16,937 in accordance with the provisions of section 18A(1) of the Ordinance which read as follows:—

"Subject to the provisions of this section, where in the basis period for any year of assessment any person engaged in working a plantation in the States of Malaya has incurred capital expenditure upon the plantation, he shall be entitled to an allowance for that year of assessment and each of the succeeding nine years of assessment equal to one-tenth of that expenditure."

However, section 18A(3) provides:—

"Where any person would, if he continued to be engaged in the working of any plantation in the States of Malaya, be entitled under this section to an allowance in respect of any expenditure, and the whole of his interest in the land comprising the plantation or in any part of such land, is transferred whether by operation of law or otherwise, to some other person, then—

(a) ....

(b) ....

(c) any sum of money or consideration received by the person from whom such interest is transferred in respect of capital expenditure on which allowances have been made under this section shall be deemed to be income of such person for the year of assessment in the basis period for which it is received, or, in the case of a person who has ceased to derive income from the plantation, for the year of assessment in the basis period for which such cessation occurs."

It is clear from the above provisions that the proceeds of sale of the buildings would be treated as income but four provisos apply in respect of these proceeds. The Special Commissioners in this case applied the provisions of proviso (i) as follows:

"Provided that—

(i) the sum of money or consideration deemed to be the income of any person under this paragraph shall not exceed the aggregate of the allowances made to that person under this section in respect of capital expenditure incurred on the plantation or part of the plantation in which such interest has been transferred;"

without apparently addressing their minds to proviso (ii) which reads:

"Provided that—

(i) ....

(ii) any sum of money or consideration received by a person in respect of capital expenditure on which allowances have been made under this section shall be deemed to be income of such person only to the extent that the total of the allowances made to him under this section in respect of the interest transferred, together with any such sum, exceeds the capital expenditure incurred by such person;"

Counsel for Revenue argued that the Special Commissioners were correct in not considering or applying proviso (ii) of section 18A(3) because that proviso could only apply to the situation where the ten-year period during which allowances for capital expenditure on plantations could be claimed had expired whereas in the case of the Kahang Estate this period had not been exhausted when the sale took place. Counsel for the appellant indicated that no submission to this effect had been made before the Special Commissioners but did not object to it being made for the first time before me. However, he contended that such a submission could not be correct if one addressed one's mind to the provisions of section 18A(3) which clearly envisaged a situation where allowances for capital expenditure were still available. I agree with his contention for the following words of section 18A(3) make this clear:—

"Where any person would, if he *continued to be* engaged in the working of any plantation ... *be entitled under this section to an allowance in respect of any expenditure*...."

The italics are my own and the italicized words clearly envisage the situation of the taxpayer still being in a position to enjoy allowances under section 18A(1) if he continued to work his plantation. To be entitled to do so, however, it is obvious from section 18A(1) that the capital expenditure could not have been made for the whole ten-year period. I am, therefore, of the view that the Special Commissioners were wrong in addressing their minds only to the provisions of proviso (i) of section 18A(3)(c) and in failing to take into account the provisions of proviso (ii) under which the method of computation to be applied by the Special Commissioners and the result thereof would have been different. For example, if we take the undisputed figure of $16,937 which was the total allowances already granted by Revenue and added this figure to the undisputed figure of $19,209 being the proceeds of sale the sum total would be $36,146. This sum obviously does not exceed the capital expenditure of $37,052, a figure which is also undisputed by Revenue, and therefore cannot be deemed to be income of the appellant for the purpose of tax liability under section 18A(3)(c). In the circumstances, I find that there is no taxable income in respect of the buildings of the Kahang Estate and order that the assessment in respect of the year of assessment 1964 be amended accordingly.

The same question arises for decision in respect of the buildings on the Ghim Khoon Estate for the year of assessment 1966. These buildings were valued at $55,951.50 on the evidence before the Special Commissioners and this figure was accepted both by counsel for the appellant and counsel for Revenue. The tax allowances already granted under section 18A(1) amounted to $58,824. Applying the provisions of proviso (ii) of section 18A(1)(c) the sum total of the proceeds of sale of $55,951.50 plus the allowances of $58,824 amounts to $114,775.50 which figure exceeds the capital expenditure on the buildings totalling $91,649 by $23,126. The Special Commissioners, however, again made the same error of law by applying the provisions of proviso (i) and arrived at the figure of $55,951.50 as the taxable income. I therefore find that the taxable income in respect of the buildings on the Ghim Khoon Estate for the year of assessment 1966 is $23,126 and I direct that the assessment for that year be amended accordingly.

I come now to the question of the payments made to the secretaries and agents of the appellant which were disallowed by the Special Commissioners in their third deciding order as not being out-goings and expenses wholly and exclusively incurred in the production of the appellant's income.

It was part of the undisputed facts that the appellant in the conduct of its business undertaking employed agents and secretaries under two written agreements which provided that in the event of the sale of the whole or any part of the appellant's estates, they would be entitled to payment by way of compensation for loss of earnings of a sum equal to two and one-half per centum of the consideration for the sale. Between 1963 and 1966 the appellant sold 6 estates — the Kahang Estate in Johore, the Ghim Khoon Estate in Kedah, the Bukit Genting Estate in Kedah, the Ulu Ara Estate in Negri Sembilan, the Central Paloh Estate in Johore and the Gopeng Estate in Perak. Because of these sales the appellant was obliged to and did make the compensation payments under the terms of the written agrements to its secretaries and agents. The first agreement was executed on May 17, 1961 between the appellant and Eastern Industries Limited, a company having its registered office in London (hereinafter referred to as "the London Agents"), and thereby the London Agents were appointed the appellant's secretaries and sole commercial agents and undertook to perform and were responsible for the entire secretarial work and general conduct and management of the affairs of the appellant in England. Clause 12 of this agreement provides:

"If and whenever during the currency of this Agreement the Company [appellant] shall in the ordinary course of conducting its business voluntarily sell or dispose of some part of its estates the Agents [the London Agents] shall be entitled to be paid by way of compensation for loss of commission in respect of that part a sum equal to 2½ per cent of the consideration for the sale or disposal or such higher percentage as may be agreed between the parties hereto." (Vide Exhibit A1, page 45).

The second agreement was entered into on March 30, 1966 between the appellant and Eastern Plantations Agency Limited, a company incorporated in the Federation of Malaya (hereinafter referred to as "the Eastern Agents") whereby the Eastern Agents undertook to perform duties normally performed by sole agents of plantation companies in the East including arranging for the forwarding of all produce from the estates of the appellant to the place of manufacture and for the shipment of any produce as required. Clause 7 of this agreement provides:—

"In the event of the sale by the Company of the whole or any part of its estates the Agents [the Eastern Agents] shall be paid by the Company [the appellant] by way of compensation for loss of earnings hereunder a sum equal to two and one-half per centum of the gross sale price." (Vide Exhibit A1, pages 38-39).

As has been stated earlier it was accepted by Revenue that the various estates were sold to generate funds in order to implement the appellant's plan to embark upon the more profitable scheme of large-scale oil-palm planting as it had to meet heavy capital costs for the installation of oil-palm mills and oil palm cultivation. It was also accepted by Revenue that all the estates had been run as one business concern and it was not at any time disputed by Revenue that the secretaries and agents managed these estates as one undertaking. Nor was it disputed by Revenue that the payments of compensation to the London Agents and the Eastern Agents were compulsory legal obligations the appellant had to fulfil under the two agreements. It was the contention of the appellant as evidenced by its Accountant's letter of July 22, 1971 addressed to Revenue (Vide Exhibit A1 page 47-48) that the

"remuneration paid to the London and Eastern Agents was under the terms of agency agreements based on planted acreage and also, in the case of the London Agents, the number of the company's shareholders. This represents normal recurring business expenditure chargeable against revenue and the compensation payments made on the sale of any particular area simply rid the company of the necessity of continuing future payments of commission in respect of the administration of that area. The United Kingdom Revenue has agreed that such payments are allowable deductions following decisions in tax cases."

The Revenue reply of August 3, 1971 to this letter (Vide Exhibit A1 page 49) rejecting the above contention gave three reasons for disallowing these compensatory payments as deductions, namely —

(i) that the compensation payments were incurred primarily in connection with the sale of the assets which on their disposal brought the appellant's trade to a close;

(ii) that United Kingdom law allows such expenditure if it is wholly and exclusively laid out for the purpose of trade but Malaysian law is more restrictive and an expenditure is allowable only if it is wholly and exclusively incurred in the production of income;

(iii) that in a similar case in 1968 the Special Commissioners decided against allowing such a deduction for similar payments.

The first two points were again the thrust of Revenue counsel's arguments in the appeal before me. Although he conceded that all the estates were run as one plantation undertaking, he submitted the crucial question was the time of the payment of the compensation and this was effected on each occasion after the disposal of the estate. That being the case, the estate was outside the purview of the running accounts of the appellant's business and the compensation payments must, for the purposes of income tax, be separated from these accounts and it cannot be argued that these payments were outgoings and expenses wholly and exclusively incurred in the production of the appellant's income.

Section 14(1) of the Ordinance under which the appellant was held liable to pay income tax in respect of the compensation payments reads as follows:—

"For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Ordinance, in this Part referred to as 'the income', there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by such person in the production of the income, including — ...."

It is, I think, appropriate at this stage to also examine the relevant English law, i.e. the Income Tax Act, 1918. Section 209 of this Act provides that "In arriving at the amount of profits or gains for the purpose of income tax — (a) no other deductions shall be made than such as are expressly enumerated in this

Act", and when you go to the applicable Rules which are contained in Schedule D, you find in Rule 3 that in computing the amount of profits or gains to be charged it is clearly laid down that no sum is to be deducted "in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation."

The Special Commissioners in arriving at their decision that the compensation payments were not allowable deductions found that the appellant had failed to discharge its onus of proof that they were outgoings and expenses wholly and exclusively incurred in the production of its income. Although a number of English authorities favourable to the appellant's case were quoted to them they were of the opinion that these authorities had no real bearing upon the issue because they considered the relevant words of the English Income Tax Act were not as restrictive as those in the Ordinance which speaks of "all outgoings and expenses wholly and exclusively incurred ..... *in the production of the income*" whilst the material English words relate to those "wholly and exclusively *laid out for the purposes of the trade.*" (The italics are my own). Counsel for the appellant was of the view that the Special Commissioners were wrong in not considering these cases because they afforded great enlightenment on matters of principle and had been considered and applied by the Australian Courts in relation to Australian tax legislation worded similarly to ours. It was also very strongly argued by counsel for the appellant that as a matter of common-sense and experience there can be no denying that anything expended for the purposes of trade must be for the purpose of producing income. There appears to be a lot of persuasive authority for that argument in the words of Lord Davey who, in the House of Lords case of *Strong and Company of Romsey Limited* v. *Woodifield (Surveyor of Taxes),*[1] said at page 220:—

"I think that the payment of these damages was not money expended 'for the purpose of the trade'. These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc."

Words to this effect were also uttered by Pollock M.R. in the Court of Appeal case of *Rowntree & Company Limited* v. *Curtis (H.M. Inspector of Taxes),*[2] at page 696 as follows: —

"... it is clear that in order to justify a deduction being made from what I will call the gross profits, it has to be shown — and I think on this the onus lies upon the subject — that what is sought to be deducted is money wholly and exclusively laid out or expended for the purposes of the trade — laid out, that is, for the purpose of earning the profits."

Again the meaning of the relevant words was given clarification by Lord Simonds in the House of Lords case of *Smith's Potato Estates Ltd.* v. *Bolland (H.M. Inspector of Taxes),*[3] at page 292 thus —

"My Lords, I suppose that few expressions have been discussed more often in the court than that which you have once again to consider, 'money wholly and exclusively laid out or expended for the purposes of the trade.' But it is their application rather than their meaning that is in doubt ... But it is, I think, important to emphasise that the words 'for the purposes of the trade' in their context, that is, where a computation of profits for the ascertainment of taxable income is being made, must mean 'for the purpose of enabling a person to 'carry on and earn profits in the trade'."

So much then for the meaning of the expression "money wholly and exclusively laid out or expended for the purposes of the trade," as expounded by the English Courts at the highest level.

This meaning has been accepted by Australian Courts dealing with income tax provisions almost identical to ours. The relevant Australian provisions are contained in the Australian Income Assessment Act 1922-1932 as follows:—

"Section 23(1). In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer shall be taken as a basis, and from it there shall be deducted — (a) all losses and outgoings (including commission, discount, travelling expenses, interest and expenses, and not being in the nature of losses and outgoings of capital) actually incurred in gaining or producing the assessable income.

"Section 25. A deduction shall not in any case be made in respect of the following matters:—

....

(e) money not wholly and exclusively laid out or expended for the production of assessable income."

A comparison of the above provisions with those of section 14(1) of the Ordinance seems clearly to indicate that the same rationale applies and it is apparent from the case of *W. Nevill and Company Limited* v. *The Federal Commissioner of Taxation,*[4] that the High Court in Australia did not hesitate to call in aid English authorities in considering the meaning of similar words in Australian taxation legislation. In that case the facts as given in the headnotes were that a company which previously had been managed by one managing director in July 1930 introduced a system of joint management, and under an agreement appointed an additional managing director for a term of five years from July 1, 1930 at a salary of £1,500 per annum with a percentage of profits. In August 1930 the salaries of the managing directors were reduced for 6 months without prejudice to rights under any service agreement. The system of joint management did not work out satisfactorily and tended to impair the efficient management of the business, and, in the belief that its abolition would lead to increased efficiency, and with a view to saving his salary, an arrangement was made in March 1931, for the resignation of the additional managing director under which the company agreed to pay him a sum of £2,500 in consideration of his cancelling his agreement and did so. It was held that this sum was a loss or outgoing incurred in gaining or producing assessable income within the meaning of section 23(1)(a) of the said Income Tax Assessment Act, 1922-1932 and that its deduction therefrom was not prohibited by section 25(e) of the Act because it was money wholly and exclusively laid out in the production of such assessable income. In the course of his judgment Latham C.J. stated (and for the sake of a better appreciation I set out below at some length the relevant portions thereof) at pages 300 to 302:

"The payments in question were actually made *bona fide* in the course of business in the interests of the efficiency of the business. In my opinion they fall within the terms of the proposition of Viscount Cave L.C. in *British Insulated and Helsby Cables* v. *Atherton* ([1926] A.C., at p. 212): 'A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in

order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade.' The words 'for the purposes of the trade' come from Schedule D of the English Income Tax Act 1842. They do not appear in section 23(1)(a) of the Federal Act. The words in section 23(1)(a) are 'in gaining or producing the assessable income.' The principle asserted in Viscount Cave's statement is, however, equally applicable to a case arising under section 23(1)(a). The facts stated in this case show that the expenditure was actually incurred in gaining or producing the assessable income of the year in question. The expenditure was made for the purpose of increasing the efficiency of the company and therefore increasing its income producing capacity. It was not a capital expenditure, it was, in my opinion, an expenditure incurred in the course of gaining or producing assessable income (See *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1935) 54 C.L.R. 295).

It is urged, however, that in so far as the expenditure was directed towards reducing current and future expenses by securing relief from the onerous contract to pay £1,500 to King for five years, it did not increase assessable income. Assessable income is gross income (See section 4). The mere reduction of expenditure, though it decreases the expenditure side of an account, does not increase the receipts side of the same account. In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary, for income tax purposes, to look at a business as a whole set of operations directed towards producing income. No expenditure, strictly and narrowly considered, in itself actually gains or produces income. It is an outgoing, not an incoming. Its character can be determined only in relation to the object which the person making the expenditure has in view. If the actual object is the conduct of the business on a profitable basis with that due regard to economy which is essential in any well-conducted business, then the expenditure (if not a capital expenditure) is an expenditure incurred in gaining or producing the assessable income. If it is not a capital expenditure it should be deducted in ascertaining the taxable income of the taxpayer.

3. It is now necessary to consider whether the deduction of the expenditure in question is prohibited by section 25(e), which forbids the deduction of any money not wholly and exclusively expended for the production of assessable income. Under head 2 above I have already dealt to some extent with this aspect of the case and have expressed the opinion that the expenditure was incurred in gaining or producing assessable income. The question which it is now necessary to determine is whether it was wholly and exclusively laid out or expended for that purpose. The same question arose under similar circumstances in *Mitchell* v. *B. W. Noble Ltd.* ([1927] 1 K.B. 719). In that case a company paid a sum of money as the price of getting rid of a life director whose presence on the board was regarded as detrimental to the conduct of the company's business (See the acceptance of this case as rightly decided in *Van Den Berghs Ltd.* v. *Clark* ([1935] A.C., at p. 441). It was held that the expenditure was an income expenditure and that it could properly be deducted as money 'wholly and exclusively laid out and expended for the purposes of the trade.' All the relevant circumstances are the same as in the case now before the court, and, in my opinion, *Mitchell's* case ([1927] 1 K.B. 719) is sufficient authority to justify the conclusion that the deduction claimed is not prohibited by reason of section 25(e)."

The only authority which appears to go against the logic of relying upon English authorities is the case of *Ward and Company, Limited* v. *Commissioner of Taxes*,[5] decided in the Privy Council in respect of an appeal from the Court of Appeal in New Zealand. There Viscount Cave L.C. in delivering the judgment of the Privy Council rejecting a brewery company's expenditure in printing and distributing anti-prohibition literature as being expenditure "not exclusively incurred in the production of assessable income" stated in the penultimate paragraph of that judgment:—

"It is only necessary to add that the decisions on the English Income Tax Acts, the language of which is different from that of the New Zealand Act, have no real bearing upon the question now under decision."

It would appear that it was on the basis of this dictum that the Special Commissioners failed to consider the English authorities in giving their interpretation of section 14(1) of the Ordinance (Vide sub-paragraphs (iii) and (v) of paragraph 11 at page 20 of the Case Stated). I think the Special Commissioners gave too much importance to these words which at best were *obiter dicta*. Had they considered the English authorities and the light they shed upon the meaning of the words that were being interpreted they would probably have come to a different conclusion. To say that the English decisions quoted had no bearing upon the issue before them because the language in the Ordinance is different from that in the English Act is too sweeping a statement.

For my part, I think the authorities which were cited in court by counsel both for the appellant and for the respondent on this point are relevant for the principles laid down therein have afforded me the greatest assistance in determining the question at hand. I have considered these authorities but I think the case which answers squarely the questions posed by the appeal is the English case of *Anglo-Persian Oil Co., Ltd.* v. *Dale (H.M. Inspector of Taxes)*,[6] which was heard in the High Court of Justice before the eminent tax judge, Rowlatt J., whose judgment in the case was confirmed by the Court of Appeal. The facts in that case have many points of similarity with those in the appeal before me. The facts were that by agreements made in 1910 and 1914 the Appellant Company appointed another limited company as its agents in Persia and the East, for a period of years, upon the terms, *inter alia*, that the agents should be remunerated by commission at specified rates.

With the passage of time the amounts payable to the agents by way of commission increased far beyond the amounts originally contemplated by the Company, and, after negotiation between the parties, the agreements were cancelled in 1922, the agent company agreeing to go into voluntary liquidation and the Company agreeing to pay to the agents £300,000 in cash. This sum was in fact paid and the Company contended before the Special Commissioners that it was an admissible deduction in computing the Company's profits for purposes of Income Tax and Corporation Profits Tax. The Special Commissioners rejected this contention and the Company appealed. It was held that the payment to the agents in respect of the cancellation of the agency contract was an admissible deduction and Rowlatt J. explained the basis for the decision at pages 261 to 263 as follows:—

"As far as I can understand by the Case stated by the Commissioners, it simply was the case of a lump sum payment in lieu of all these payments of commission in future, payable now of course, and payable with very heavy discount on what the total commissions would be, and on the other hand without getting the benefit of the services for which the commissions would be paid. It is simply nothing more than a lump sum payment to the servant to leave a lucrative employment, and I cannot see that it is anything else.

Now I want to see how the Commissioners have dealt with it, and what they say is that this was expenditure of a capital nature to secure an enduring benefit for the company's trade by getting rid of an onerous contract. In my judgment that is a finding which is perfectly inconclusive. It does not deal with the question. The question is not merely getting rid of an oner-

ous contract, but an onerous contract for what? If it is an onerous contract for the payment of wages or commission which are chargeable to revenue account in the plainest possible way, and if that is the onerous contract that you are getting rid of, it is impossible to suggest that that is a reason for saying that this is a capital expenditure unless you get rid of that onerous contract (as I pointed out just now) by erecting in its place a capital asset in the nature of — of course I am only using this as an illustrative example — a labour-saving machine which gives you an asset and so dispenses with the expense of labour. But to say that it is a capital expenditure because it secured an enduring benefit by getting rid of an onerous contract is not to state the material thing, and it is completely inconclusive.

. . . .

This sum of £300,000 with which this case deals, upon the fact of this case, appears to me to represent nothing at all but the lump sum representing the future emoluments of the agent which are being redeemed (if I may use that expression, as it has been used before) by that arrangement."

I do not think it can be disputed in the appeal before me that the compensation payments were made in the course or conduct of the appellant's business. What has been denied by the respondent is that these payments were disbursed wholly and exclusively for the production of its income within the meaning of section 14(1) of the Ordinance. It was urged by counsel for the respondent that as the payments were made to the agents only after the disposal of parts of the whole estate the payments were not made for the production of any income from these parts but on the contrary were in fact for the cessation of income from those portions of the estate which had been disposed of. I must say I find it somewhat difficult to understand the force of this argument. I do not think it is possible to separate the parts from the whole for it was obvious and was admitted even by Revenue that the company ran all the plantations as a single commercial undertaking. I do not think it can be disputed that the sale of the estates was no more than an incident in the conduct of the whole undertaking the object of which was to make the appellant's commercial undertaking a more profitable proposition. The payments by way of compensation resulting as a matter of legal obligation from the sale must of necessity, in my view, be regarded as a matter of commercial expediency and attributable to the whole venture which was carried out for the production of income. They were made in order indirectly to facilitate the carrying on of the business and were accordingly incurred wholly and exclusively in the production of income. I am of the view that the Special Commissioners were wrong in their finding on this score.

On the persuasive authority of the Scottish Court of Sessions case of *Vallambrosa Rubber Co. Ltd.* v. *Farmer (Surveyor of Taxes),*[7] it is, I think, clear that the expenses sought to be deducted need not be referable to the profits of a particular year. The Lord President in that case at page 534 had this to say:—

"The Junior Counsel for the Crown, encouraged by certain expressions which he found used by various learned judges who had given judgments in Tax Cases, wished your Lordships to accept this proposition, that nothing ever could be deducted as an expense unless that expense was purely and solely referable to a profit which was reaped within the year.

I think the proposition only needs to be stated to be upset by its own absurdity. Because what does it come to? It would mean this, that if your business is connected with a fruit which is not always ready precisely within the year of assessment you would never be allowed to deduct the necessary expenses without which you could not raise that fruit."

Although the point was not specifically relied upon in the appeal by Revenue counsel, I do not think it can be questioned that a single lump sum payment eliminating the necessity of recurrent payments is a deductible expense. If any authority for this is required one need only look to *J.P. Hancock (Surveyor of Taxes)* v. *General Reversionary and Investment Co., Ltd.*,[8] where Lush J. said at page 372: —

"It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure, as it would be to hold that, if an employer were under a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay."

Counsel for Revenue tried to distinguish the facts in the *Anglo-Persian Oil Company* case and in *Hancock's* case on the ground that in these cases the deductions were allowed because the company in each instance was trying to rid itself of an onerous liability. I do not think this distinction valid in this case.

In the result, I am of the view that if the Special Commissioners had properly instructed themselves in the law they would have reached the conclusion that the expenditure of $405,334 by the appellant by way of compensation for loss of earnings or commission to its London and Eastern Agents was deductible under the provisions of section 14(1) of the Ordinance. I therefore hold that the said expenditure is deductible for income tax purposes and direct that the assessment for the year of assessment 1967 be amended accordingly.

This appeal is allowed with costs.

Appeal allowed.

Solicitors: *Skrine & Co.*

HUSDI v. PUBLIC PROSECUTOR

[O.Cr.J. (Syed Othman F.J.) April 27, 1979]

[Kuala Lumpur — Criminal Revision No. 9 of 1978]

Criminal Law and Procedure — Statements made in course of police investigations — Whether accused entitled to copies of such statements — Whether public documents — Statements absolutely privileged — Evidence Act, 1950, ss. 74, 76, 78 & 145 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 108A, 112 & 113.

Evidence — Whether statements made in the course of police investigation are public documents — Evidence Act, 1950, ss. 74 & 76.

In this case the accused had been charged with the offence of house breaking by night. His counsel applied for copies of the cautioned statement made by the accused to the police and of the statements recorded by the police from witnesses in the course of investigation. The application was refused by the Deputy Public Prosecutor and application was made to the High Court. When the matter came up for hearing, only the application for the statements made in the course of police investigations was pursued, as it had been held in *Khoo Siew Bee* v. *Ketua Polis Kuala Lumpur*[1] that an accused person is entitled as of right to a copy of his cautioned statement.

Held: (1) the right of an accused person to the first information report is nothing more but a consequence of his right to be informed as soon as may be of the grounds of his arrest, under Article 5(3) of the Constitution and this Article